

SERVICE DATE - NOVEMBER 3, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-471 (Sub-No. 4X)

SOUTH KANSAS AND OKLAHOMA RAILROAD COMPANY--ABANDONMENT  
EXEMPTION--IN CRAWFORD, ELK AND GREENWOOD COUNTIES, KS AND OSAGE  
AND TULSA COUNTIES, OK

Decided: November 2, 2000

South Kansas and Oklahoma Railroad Company (SKO) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon: (1) a 35-mile line of railroad between milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Osage and Tulsa Counties, OK; (2) a 6-mile line of railroad between milepost 359.0 at Pittsburg and milepost 365.0 at Cherokee, in Crawford County, KS; and (3) a 23.5-mile line of railroad between milepost 438.5 at Severy and milepost 415.0 at Fredonia, in Wilson, Elk and Greenwood Counties, KS. Notice of the exemption was served and published in the Federal Register on October 6, 2000 (65 FR 59891-92).

By petition filed October 3, 2000, the City of Pittsburg (City) filed a request for issuance of a notice of interim trail use (NITU), under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905 for the portion of the right-of-way between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee, in Crawford County, KS, a distance of 6 miles, in order to negotiate with SKO for acquisition of the right-of-way for use as a recreational trail.

The City requested that SKO be prohibited from disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms, and that SKO be barred from removing or destroying any trail-related structures, such as bridges, trestles, culverts and tunnels for a 180-day period from the effective date of the abandonment exemption. The City states that it needs the full 180-day period to complete a trail plan and to negotiate with SKO. The City submitted a statement indicating its willingness to assume full financial responsibility for the management of, for any legal liability arising out of the transfer or use of (if the user is immune from liability, it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service. By facsimile received on November 1, 2000, SKO indicated its willingness to negotiate with the City for interim trail use.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may

prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). The City has satisfied the requirements for both a public use condition and a NITU for the 6-mile line in Crawford County, KS, and imposition of both would therefore be appropriate commencing with the effective date of the exemption. Because a notice of intent to file an offer of financial assistance (OFA) to continue rail service has been received in this proceeding and an OFA takes priority over a request for a NITU or a public use condition, however, issuance of a NITU and public use condition will be delayed until the OFA process has been completed.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on October 13, 2000. Following receipt of comments on the EA, SEA has recommended that the following conditions be imposed on any abandonment authorization: (a) SKO shall consult with the U.S. Environmental Protection Agency (EPA), Regions 6 and 7, regarding the discharge of stormwater resulting from the disturbance of more than 5 acres, and consult with the EPA and secure all necessary permits prior to initiation of salvage or disposal activities; (b) if salvage operations are expected to destroy or disturb any of the 40 geodetic station markers identified by the U.S. Department of Commerce, National Geodetic Survey (NGS), SKO shall notify NGS not less than 90 days prior to commencement of such operations; (c) SKO shall consult with the Oklahoma Historical Society (SHPO) prior to salvage of the rail line to determine if the proposed abandonment is consistent with the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (d) before initiation of salvage activities at or near existing highway/rail at-grade crossings, SKO shall submit its salvage plans to the Kansas Department of Transportation, the Oklahoma Department of Transportation, and the Oklahoma Corporation Commission for review; (e) SKO shall consult with the Kansas Department of Health and the Oklahoma Department of Environmental Quality prior to abandonment to secure all necessary permits prior to initiation of salvage or disposal activities; and (f) SKO shall consult with each of the Kansas Counties of Crawford and Greenwood and the Oklahoma Counties of Osage and Tulsa to secure all necessary permits and to address concerns regarding the impact of salvage activities on existing at-grade crossings prior to abandonment and prior to conducting salvage activities at or near at-grade crossings.

The exemption in this proceeding was scheduled to become effective on November 7, 2000, but a formal expression of intent to file an OFA was timely filed by Zephyr Capital Corporation (Zephyr), to purchase the 6-mile portion of the right-of-way between milepost 359.0 and milepost 365.0 in Crawford County, KS. The filing of the notice of intent has the effect of

staying the effective date of the exemption for 10 days until November 17, 2000.<sup>1</sup> Zephyr simultaneously requested that SKO provide it with the financial data and information prescribed in 49 CFR 1152.27(a). Under 49 CFR 1152.27(c)(2)(ii)(B), OFAs are due no later than 30 days after publication of the notice of exemption in the Federal Register, which in this proceeding would be November 5, 2000. In its filing, Zephyr requested that the Board toll the time for submitting an OFA for 60 days. Zephyr stated that an extension was necessary because it was unlikely that the requested information would be received prior to October 16, 2000. In a letter submitted by facsimile on November 1, 2000, SKO provided Zephyr with the required information in accordance with 49 CFR 1152.27(a) and stated that it opposes the 60-day extension of the period for filing an OFA. SKO contends that, because there has been no traffic or shippers on the line for decades, Zephyr's notice of intent to file an OFA to continue rail freight service is suspect. SKO argues that an extension of the due date for the filing of what appears to be a fraudulent OFA is unwarranted.

Under section 1152.27(c)(2)(ii)(C), the Board will entertain petitions to toll the 30-day period for filing OFAs when an applicant has failed to provide a potential offeror with the information necessary to the development of its OFA. Where, as here, it appears that SKO has already provided the necessary information, an extension of 15 days would be reasonable.<sup>2</sup> Accordingly, the deadline for filing an OFA in this proceeding will be extended until November 20, 2000, and the effective date of the exemption as to the 6-mile line in Crawford County, KS, that is the subject of the prospective OFA (as well as the subject of the requests for a NITU and public use condition) will be postponed until November 30, 2000.

Until the OFA process has been completed, the issuance and effectiveness of a NITU and public use condition will be delayed. If agreement is reached on the sale or subsidy of the line, trail use and public use conditions would not be necessary or available. If no OFA is filed or if no agreement is reached on the OFA, the appropriate decision and notice of interim trail use or abandonment will be issued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.

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<sup>1</sup> See 49 CFR 1152.27(c)(2)(i).

<sup>2</sup> This decision does not address SKO's argument regarding the bona fides of any future OFA filing.

2. Upon reconsideration, the exemption of the abandonment of the rail line described above is subject to the conditions that: (a) SKO shall consult with the EPA, Regions 6 and 7, regarding the discharge of stormwater resulting from the disturbance of more than 5 acres, and consult with the EPA and secure all necessary permits prior to initiation of salvage or disposal activities; (b) if salvage operations are expected to destroy or disturb any of the 40 geodetic station markers identified by the NGS, SKO shall notify NGS not less than 90 days prior to commencement of such operations; (c) SKO shall consult with the Oklahoma SHPO prior to salvage of the rail line to determine if the proposed abandonment is consistent with the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f; (d) before initiation of salvage activities at or near existing highway/rail at-grade crossings, SKO shall submit its salvage plans to the Kansas Department of Transportation, the Oklahoma Department of Transportation, and the Oklahoma Corporation Commission for review; (e) SKO shall consult with the Kansas Department of Health and the Oklahoma Department of Environmental Quality prior to abandonment to secure all necessary permits prior to initiation of salvage or disposal activities; and (f) SKO shall consult with each of the Kansas Counties of Crawford and Greenwood and the Oklahoma Counties of Osage and Tulsa to secure all necessary permits and to address concerns regarding the impact of salvage activities on existing at-grade crossings prior to abandonment and prior to conducting salvage activities at or near at-grade crossings.

3. The requests for issuance of a notice of interim trail use and for issuance of a public use condition are held in abeyance pending completion of the OFA process.

4. The deadline for Zephyr to file its OFA is extended to November 20, 2000.

5. If the OFA process terminates, a decision effective on its service date will be issued to provide a period for interim trail use and public use negotiations for the 6-mile portion of the right-of-way between milepost 359.0 in Pittsburg, KS, and milepost 365.0 in Cherokee, KS.

6. The effective date of the exemption is postponed to November 30, 2000, for the 6-mile line segment between milepost 359.0 near Pittsburg and milepost 365.0 near Cherokee in order to permit the OFA process under 49 U.S.C. 10904 and 49 CFR 1152.27 to proceed.

7. SKO may fully abandon the line segments between: (a) milepost 153.0 near Tulsa and milepost 188.0 near Barnsdall, in Osage and Tulsa Counties, OK; and (b) between milepost 438.5 at Severy and milepost 415.0, at Fredonia, in Wilson, Elk, and Greenwood Counties, KS, provided that it has satisfied the environmental and historic preservation conditions imposed.

8. This decision is effective on its service date.

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By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary